

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

v

YVES MONTAND HALL,

Defendant-Appellant.

UNPUBLISHED

April 23, 2002

No. 229463

Monroe Circuit Court

LC No. 99-029787-FH

Before: Cooper, P.J., and Hood and Kelly, JJ.

PER CURIAM.

Defendant appeals as of right his conviction for delivery of less than fifty grams of a controlled substance, MCL 333.7401(2)(a)(iv), for which he was sentenced as a second habitual offender, pursuant to MCL 333.7413(2), to one to forty years' imprisonment. We affirm.

Defendant first contends that insufficient evidence was presented at trial to support his conviction. We disagree. In reviewing the sufficiency of the evidence, we view the evidence in the light most favorable to the prosecution and determine whether a rational trier of fact could find that the essential elements of the crime were proven beyond a reasonable doubt. *People v Johnson*, 460 Mich 720, 723; 597 NW2d 73 (1999).

Defendant claims there was insufficient evidence for a rational trier of fact to conclude that he was the individual who sold crack cocaine to the undercover officer. Rather, defendant contends that several of the officers who testified were unable to see the exchange and that the undercover officer failed to note defendant's gold tooth and cast on his left hand. Indeed, defendant suggests that the only evidence linking him to the crime was the undercover officer's identification of him based upon two photographs. Defendant also argues that he presented an alibi for his whereabouts at the time of the crime, that the vehicle involved belonged to another individual, and that the prerecorded funds were never recovered.

Viewing the evidence in the light most favorable to the prosecution, we conclude that there was sufficient proof for a jury to find that defendant delivered the cocaine. Shortly after the delivery, the undercover officer gave a general description of the individual involved and

identified defendant out of six photographs.¹ The undercover officer also testified that he closely observed defendant for about two to three minutes and that the area was well lit. While the undercover officer did not observe a cast on defendant's left hand, there was testimony that the cast was removable for daily therapy. Moreover, the undercover officer testified that it was "impossible that it wasn't [defendant]" he observed that night. We further note that the jury was free to believe or disbelieve witness Lavender's testimony that defendant was home with her that night. It is the function of the jury to decide the weight and credibility of a witness' testimony and such matters will not be resolved anew on appeal. *Johnson, supra* at 731, n. 7.

Defendant further argues that the prosecution presented insufficient evidence to prove the substance delivered to the undercover officer was actually cocaine. For a conviction under MCL 333.7401(2)(a)(vii), the prosecution must prove that defendant delivered at least some amount of a controlled substance weighing less than fifty grams. In this case, defendant asserts that the prosecution failed to establish a chain of custody to support the conclusion that the substance tested by the police laboratory was the same substance delivered to the undercover officer. We note that the prosecution is not required to prove a perfect chain of custody for evidence to be admitted at trial; rather, any gaps in the chain normally affect the weight as opposed to the admissibility of the evidence. *People v White*, 208 Mich App 126, 130-132; 527 NW2d 34 (1994).

In the instant case, the testimony established that the undercover officer packaged and labeled the evidence before he locked it in the property room. Considering the undercover officer's testimony in context, that "[h]e turned it over to Detective Miller so he could transport it to the lab," it appears that the undercover officer was referring to the time period after he placed the evidence in the property room. While Miller could not recall if any other officers were present, he testified that the property officer, Detective Sergeant Keane, signed the evidence out to him from the property room. Thereafter, Miller stated that he transported the evidence to the state police crime laboratory. According to the laboratory report, the substance delivered contained cocaine and weighed 1.133 grams. We conclude that this evidence was sufficient for the jury to determine that the same substance was delivered to the undercover officer and to the police laboratory. See *White, supra* at 133-134.

Defendant further purports that he was prejudiced when the trial court permitted a post-trial amendment to the information. However, defense counsel agreed with the trial court's resolution of the issue after the prosecution renewed its motion to amend the information. Therefore, defense counsel waived any objection to the amendment and extinguished any error. *People v Carter*, 462 Mich 206, 215; 612 NW2d 144 (2000). Moreover, defendant has failed to show that he was prejudiced by the amendment. See *People v Waller*, 70 Mich 237, 238; 38 NW 261 (1888).

¹ We note that an independent basis for a witness' in-court identification is unnecessary when a defendant has failed to show that any pretrial identifications were impermissibly suggestive. *People v McElhaney*, 215 Mich App 269, 287-288; 545 NW2d 18 (1996); see also *People v McCray*, 245 Mich App 631, 639-640; 630 NW2d 633 (2001).

Defendant also argues that the prosecutor made improper and disparaging remarks towards defense counsel during its opening statement. Specifically, defendant contends that the prosecution's reference to defense counsel's momentary absence from the defense table shifted the jury's attention toward defense counsel's conduct and away from the evidence. We disagree. "This Court reviews claims of prosecutorial misconduct case by case, examining the remarks in context, to determine whether the defendant received a fair and impartial trial." *People v Aldrich*, 246 Mich App 101, 110; 631 NW2d 67 (2001). Because defendant failed to object to the alleged improper remarks below, we review this claim for plain error affecting his substantial rights. *People v Carines*, 460 Mich 750, 763-764, 774; 597 NW2d 130 (1999); *Aldrich, supra* at 110.

Assuming arguendo that the prosecutor's remark about defense counsel's absence was improper, it was an isolated comment during opening statements and any resulting prejudice could have been cured by a timely instruction from the court. *People v Green*, 228 Mich App 684, 693; 580 NW2d 444 (1998). Additionally, any potential error was cured when the trial court instructed the jury that statements of the attorneys were not evidence. See *People v Graves*, 458 Mich 476, 486; 581 NW2d 229 (1998). Thus, we find that defendant failed to establish plain error affecting his substantial rights. *Carines, supra* at 763-764, 774.

Affirmed.

/s/ Jessica R. Cooper

/s/ Harold Hood

/s/ Kirsten Frank Kelly